IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CRIMINAL APPEALLTE JURISDICTION.

CRIMINAL APPEAL NO. 873 OF 2003

Dnyandeo Bandu Gadekar & Anr.... ....
Appellant. V/s
(Orig.Accd. Nos.2 & 3)
The State of Maharashtra ....
Respondents.

Mr.P.B.Naiknaware, Adv. for the appellant.

Mrs.S.D.Shinde, APP for the State.

CORAM: V.G. PALSHIKAR
AND
SMT.NISHITA MHATRE, J.

14th Nov., 2006.

ORAL JUDGMENT: (Per Palshikar, J.)

Being aggrieved by the judgment and order of conviction and sentence passed by the learned VI Additional Sessions Judge, Solapur in Sessions Case No.6 of 2003 on 24.6.2003 the appellants-accused have preferred this appeal on the grounds mentioned in the memo of appeal as also verbally canvassed before us.

2. With the assistance of the learned Advocate for the appellants as also the learned Public Prosecutor we have scrutinized the entire evidence on record and reappreciated the same.

3. The prosecution case briefly stated is that the deceased Mandakini Sanjay Gadekar was the wife of accused No.1. The accused

No.2 is father and the accused No.3 is the mother of the accused No.1. All the accused reside jointly at village Anjangaon Khed, Taluka Madha, District Solapur.

4. According to the prosecution all the accused in furtherance of their common intention subjected Mandakini Gadekar to cruelty and harassment on account domestic quarrel, which used to take place between them. It is further case of the prosecution that on 5.8.2002 Mandakini asked the accused No.1 to bring bread. The accused No.1 brought bread as per the wish of Mandakini. This incident took place at about 10 in the morning. According to the prosecution, the accused Nos. 2 and 3 were annoyed as the accused No.1 purchased bread as per the wish and desire of Mandakini. Thereafter quarrel took place between them, i.e. Mandakini and all the accused. The accused No.1 beat Mandakini with the help of one wooden log. The accused no.2 poured kerosene on the person of Mandakini. The accused No.3 lighted a match stick on the person of Mandakni and set her on fire. After seeing the fire on the person of Mandakini, the accused No.1 tried to extinguish the fire. Thereafter Mandakini was taken to the primary health center Madha, at about 10.45 a.m. On 5.8.2002 by accused No.1. Primary medical aid was provided to Mandakni in the Primary Health Center, Madha. Thereafter as per the direction of the medical officer, Primary Health Center, Madha, Mandakini was shifted to Civil

Hospital.

5. After the First Information Report was lodged investigation was taken up, accused were arrested and on completion of investigation the accused persons were prosecuted. The prosecution examined seven witnesses to prove its case, and the defence examined one witness that the accused were not guilty. On appreciation of the entire evidence on record the learned trial Judge came to the conclusion of guilt and convicted accused as aforesaid.

6. It was contended by the learned advocate appearing on behalf of the appellants accused that there are material contradictions in Exhs. 16 and 17 which are dying declarations recorded by the prosecution. Those dying declarations if considered with the evidence of D.W.1 will prove that the accused were not guilty of any offence. The learned advocate pointed out to us certain glaring contradictions which according to him existed in the dying declarations as proved by the prosecution. Relying on previous history of suicidal attempt by the victim it was contended that this is a case of accidental death and not murder and hence the accused deserve to be acquitted. The learned additional public prosecutor appearing for the prosecution contended that the minor contradictions in the dying declarations need not result in rejection of the dying declarations in toto. The other corroborative evidence on record is adequate to accept the Exh.17 as correct dying

declaration duly corroborated and therefore the conviction should be maintained. We have to examine these rival contentions in the light of evidence as reappreciated by us.

7. Exh.17 was recorded at 1.50 p.m. on 5.8.2002. It bears certificate of the doctor certifying that the patient was in position to give statement and the condition of the health was good enough for making such deposition. This declaration was recorded by PW2-Nandkumar Shahane who was Assistant Sub Inspector at Sadar Bazar police station, Solapur at the relevant time. He has stated before the Court that at about 1.30 p.m. Dr.Ghorpade called him and informed him of the burnt case admitted in the hospital. He therefore went to the hospital, saw the victim and made phone call to the Special Executive Magistrate requiring him to come to hospital to record the dying declaration of burnt patient. Then he went back to the Out Patient Department and asked the doctor whether the patient was conscious. The doctor examined the patient and stated that the patient was in condition to give statement. He made endorsement to that effect. Then the PW2 asked the patient as to what happened and she then proceeded to narrate all the factual happenings. He has proved Exh.17 as the document being dying declaration recorded by him.

8. He then states in para 2 of his deposition that as per his phone

call to one Shri Chiniwar came to the hospital and produced the yadi-Exh.14 sent to him and then recorded the dying declaration of the victim Mandakini and handed over the same to the witness. He produced it in the Court which is marked as Ex.18.

9. In this dying declaration the victim has said that she was married three years ago and she was residing with her husband, father-in-law, mother-in-law, brother-in-law and one small daughter. On the date of incident according to her, she wanted bread for eating, she told her husband and the husband brought th;e bread for her. Her parents-in-law were aggrieved by this action as according to them it was pampering and started abusing her. The victim retorted and therefore she was given 3/4 slaps by her husband and then father-in-law said that I will sell one acre of land but will finish you and he poured kerosene on her body and her mother-in-law put her afire as a result of which she sustained burn injuries. She mentions that her husband tried to douse the fire and took her to the hospital and therefore she has grudge against her husband, father-in-law and mother-in-law. This dying declaration Exh.17 has the endorsement of the doctor and has been duly proved by writer P.W.2 who is Assistant Sub Inspector of police. In this dying declaration the victim has clearly stated the following:

i) That there was a verbal exchange because of purchase of bread;

ii) As a result of verbal exchange the victim retorted and was therefore slapped by her husband;

iii) Father-in-law declared intention to sell one acre of land if necessary but will kill her and accordingly poured kerosene on her;

iv) Mother-in-law put her on fire by lighting a match stick.

v) She has deposed that her marriage took place three years ago and were occupants of the house. This was therefore the first statement made by the victim and recorded as dying declaration by a police officer.

10. As will be seen from deposition of PW2 immediately on recording of Exh.17 PW1-Chiniwar, Special Executive Magistrate came to the hospital and wanted to record dying declaration of the victim. Accordingly he proceeded to record the statement and began the process at 2.10 p.m. in the afternoon on 5.8.2002. He has endorsed on the certificate recorded by him that at about 1.45 p.m. he received yadi and has accordingly come for recording dying declaration. In this dying declaration the victim has said that she was seven months pregnant and was assaulted by her husband and her father-in-law poured kerosene on her and mother-in-law put her on fire. This declaration has the certificate of the doctor. It is also stated to be given when the patient was in condition to make the statement. It will

be seen that two almost contradictory statements have been given by the victim. In Exh.15 which is subsequently recorded statement she does not say the cause of quarrel. She does not describe the working of husband, the composition of the family. In the first statement she does not say that she was pregnant. Apart from everything else Exh.27 is the post mortem report in which it is clearly mentioned by the doctor conducting post mortem and he has proved the report that there was no foetus present in the uterus of the victim which of necessity means that the victim was stating white lie before the Magistrate when she said that she was seven months pregnant. With enormous contradictions existing in these two statements and the revealing statement by the doctor Exh.27 recording absence of any foetus in uterus of the victim it becomes impossible to accept the testimony as given by the victim.

11. In addition to these lapses PW3-Dhanaji Chougule and PW4-Surekha Gadekar who are father and mother of the victim have turned hostile. They do not support the case of the prosecution. Probably because they knew that the victim their daughter had suicidal tendency and death was consequence of that tendency. In such state of affairs the learned trial Judge erred in law in convicting the appellants-accused under section 302. The order of conviction is therefore unsustainable in law. In the result therefore the appeal

succeeds and is allowed. The impugned order of conviction and sentence is set aside. Accused No.2-Dnyandeo Bandu Gadekar is in jail and accused No.3-Kusum Dnyandeo Gadekar is on bail. Bail bonds of accused No.3-Kusum Dnyandeo Gadekar be canceled and are hereby canceled. Accused No.2-Dnyandeo Bandu Gadekar is directed to be released forthwith if not otherwise required by law.